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SUPREME COURT, U.S.

No. 98-245

In The

Supreme Court of the United States

October Term, 1997

HOWMEDICA, INC., a Division of
Pfizer Hospital Products Group, Inc.,

Petitioner,

vs.

GEORGE E. ELBERT,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITIONER HOWMEDICA, INC.'S REPLY TO RESPONDENT GEORGE E. ELBERT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. THE SPLIT CANNOT BE RECONCILED.

The Third Circuit Court of Appeals has expressly and emphatically rejected the reasoning set forth in the decision below. *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir.), *cert. denied*, 484 U.S. 853, 108 S. Ct. 156, 98 L.Ed.2d 111 (1987); *Lightening Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993). The circuit courts are in conflict, since the Ninth Circuit and others have adopted a *per se* rule that inadmissible evidence must be considered on a motion for judgment, while the Third Circuit has recognized that in most cases improper evidence should be disregarded.

Respondent cites to *dicta* in *Lightening Lube* in an effort to minimize the circuit conflict, but the quoted passage shows only that the Third Circuit would not demand entry of judgment in *all* cases where improper evidence has been admitted. The Third Circuit did not demand that judgment be entered where the record considered without the improper evidence is still sufficient to support the verdict. 4 F.3d at 1199 Fn. 26. The court also reasoned that judgment should not be entered in a case where the evidence presented at trial was shaped or limited by the trial court's initial finding of admissibility. 4 F.3d at 1200. The Third Circuit quite reasonably did not establish a *per se* rule demanding entry of judgment, but it clearly stands in opposition to the Ninth and other circuits by holding that, absent exceptional circumstances, when a motion for judgment is made following trial, improper evidence should be disregarded.

II. THE SPLIT IS AT ISSUE.

Elbert tries to distance his case from the circuit court conflict, but he does not show any reasoned basis for treating it differently simply because the motion for judgment was made following remand. The question presented is the same: must evidence that was erroneously admitted at trial be weighed in determining whether plaintiff has met his burden of production. The Ninth Circuit gave the same answer to the question in the post-trial and post-remand contexts, for precisely the same reason: that a plaintiff may rely on the trial court's initial ruling of admissibility in determining how to present its case to the jury. The split has arisen because the Third Circuit disputes the premise of reliance, and its reasoning applies with equal force following remand.

III. THE SPLIT IS OUTCOME DETERMINATIVE.

Under the Third Circuit's approach, a court considering a motion for judgment should disregard improper evidence except where plaintiff limited its presentation of evidence at trial in reliance on the prior ruling. Since the Ninth Circuit applied its *per se* rule, it did not even inquire into whether Elbert limited his presentation based on the admission of Kayser's testimony. In fact, Elbert's presentation of witnesses was limited by pretrial rulings, and there were no available witnesses he could have called to fill the void if the objection to Kayser's testimony had been sustained during trial. Following remand in this case, the trial court considered the evidence submitted by Elbert and found the record was not sufficient to support a verdict in his favor when the improper

evidence was excised. The only reason this case survived is because of the Ninth Circuit's adherence to the *per se* rule. Petitioner respectfully requests that this Court grant certiorari to reject the *per se* rule, and bring this case to a close.

DATED: Honolulu, Hawaii, September 17, 1998.

Respectfully submitted,

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